Number 83-1405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Hiram B. Webb, Petitioner,

v.

United States of America, Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petitioner's Reply Brief

Hale C. Tognoni
Suite 1260
100 West Clarendon Avenue
Phoenix, Arizona 85013
(602) 263-0771

Counsel for Petitioner

Table of Contents

Table of Authorities

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 83-1405

Hiram B. Webb, Petitioner,

v.

United States of America

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

Petitioner's Reply Brief

Statement of the Case

In this reply a restatement of the case is incumbent upon petitioner due to important omissions, errors and irrelevancies in Respondent's Memorandum in Opposition.

Omission

Respondent omits the fact that two of the claims, Leo #1 and Leo #3, were evaluated by the Bureau of Land Management (BLM) in 1956 and left unchallenged. Those two claims were "clear-listed" by the Respondent's mineral examiner, but the implied

validity of such a listing for purposes of possessory title has been so successfully ignored in proceedings below that both the Ninth Circuit Court's remand of Sept. 8, 1981 and the Federal District Court's consequent Order on Nov. 9, 1982 stated the status of two mining claims herein, Leo #1 and Leo #3, falsely. Both courts alleged that the 1956 complaint by Respondent was against seven lode claims including the Leo #1 and the Leo #3.

Classification Order 52, under the provisions of the Small Tract Act of June 1, 1938 (as amended), exempted valid mining claims from reclassification for residential lease and sale. On March 2, 1956, and again on April 19, 1956, BLM mineral examiner Donald Reed visited the claims and subsequently filed his report. On the basis of that report, Respondent challenged only five of the claims herein - the Leo #2 and #4, the Alta Vista #1 and #2 and the Turkey Track #3, as well as other of Petitioner's claims in the area.

Respondent's charges alleged "That minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery." In his decision of December 23, 1957, the hearing examiner dismissed the charges against the five claims herein, but

the Lora, Minnie, Victor and Turkey Track #1 lode claims were invalidated.

In the context of the Reclassification Order, a dismissal of charges of invalidity is validity so far as it concerns possessory title to mining claims subject to the paramount title of the United States; and all seven of Petitioner's claims herein were validated by the clear listing or by the decision of the hearing examiner, December 23, 1957. The decision reads:

> Since the contestant's charges against the Alta Vista No. 1, Alta Vista No.2, Leo No. 2, Leo No. 4 and the Turkey Track No. 3 Lode Mining Claims are not supported by a preponderance of the evidence, those charges must be, and they are hereby, dismissed.

Error

Evidence of the placer deposit on the mineral property in question was not first asserted in 1978 after Respondent brought its Action of Ejectment (memorandum in opposition, page 3). On three occasions evidence of the Petitioner's placer mining operation has been submitted: (1) Deposits of granite and the existence of diggings into the granite were noted by mineral examiner Donald F. Reed in his report and in his testimony in the 1956 hearing;

(2) At the 1966 hearing to consider the patent application for Petitioner's lode claims, petitioner attempted to counter accusations that no mining was taking place on his claims by introducing evidence of a placer discovery. Even though Petitioner had built and maintained good roads for heavy equipment to mine the Turkey Track #3 (pages 307-306, 1966 hearing transcript), Respondent's witness concluded that the Turkey Track #3 pit had been dug purely to expose the vein of gold ore (page 33, 1966 transcript). Other evidence of granite mining was likewise disregarded (page 71, 77, and 79, 1966 transcript);

(3) Evidence of the granite mining operation was also submitted to the Federal District Court with the Petitioner's 1978 amended answer and counter-complaint.

Petitioner has survived as a small operator in the mineral industry because during times of low gold prices, he was able to continue exploring and developing his gold deposit on his claims by mining the granite. The court below is upholding a nullification of lode claims which depended for their viability on an integrated

system of mining the granite while developing the gold, be it lode or placer, under legal definition. Petitioner's granite production, deemed to be a placer deposit (pages 207-212, 1956 transcript), was not allowed to support a patent application for lode claims. No other patent application has been made on Petitioner's mining property; yet the courts below have ordered the Petitioner be evicted from the property necessary to his mineral production due to the rejection of his lode patent application.

The mining laws offer a remedy for overcoming such technicalities of the law as lode and placer distinctions represent in the case before the bar. Petitioner attempted to raise the pertinent statute to the eyes of the court when Petitioner responded with an amended answer and counter-complaint to Respondent's motion for summary judgment in the action for ejectment in the Federal District Court for Arizona. Petitioner asserted his property right under 30 USC Section 38 which provides:

> Where such person or association, they and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or the territory where the same may be situated. Evidence of such possession and

> working of the claim for such period shall be sufficient to establish a right to a patent thereto under this chapter.

Upton vs. Santa Rita Mining Company, 14, N.M. 96, 89, P. 275, 283 (1907), interprets Section 38 in terms particularly appropriate to the case here in petition:

> ...Proof of possession for the statutory period in the absence of any adverse claim was to be taken by the land department as equivalent to an establishment in detail of all facts necessary to constitute a valid location.

U.S. vs. Haskins, 505 F.2d, 246-253, October 25, 1974; Springer vs. Southern Pacific Co., 248 P. 819-824; Newport Mining Co. vs. Bead Lake G.C.M. Co., 1920, 110 Wash. 120, 188, P. 27; Altuna Quicksilver Mining Co. vs. Integral Quicksilver Mining Co., 114 Cal. 100, 45, P. 1047; Lavagnino vs. Uhlig, 26 Utah, 1, 71 P. 1046, 99 Am. St. (Rep.) 808; and Humphreys vs. Idaho Gold Mines, etc., Co., 21 Idaho, 126, 120 P. 823, 40 L.R.A. (N.S.) 817; all of the forgoing case law interprets 30 USC Section 38 to favor the validity of Petitioner's mining claims. The courts have liberally interpreted 30 USC Section 38 to allow mining claimants to overcome the technicalities which Respondent uses to nullify Petitioner's property rights and to take the land of Petitioner's mining claims without compensation.

Irrelevancy

At page 3 of its memorandum in opposition, Respondent points out that Petitioner did not ask for judicial review of the IBLA's "final" 1970 decision. We direct the court to the Ninth Circuit Court's remand in U.S. vs. Webb, No.79-3484, decided Sept. 8, 1981, which states:

> There is no statute of limitations for judicial review of an administrative decision by the Department of Interior's Board of Land Appeals in a federal mining laws proceeding; thus a BLA decision is ordinarily reviewable in a subsequent action for ejectment regardless of how much time has elapsed subject to rules of pleading which the Federal Rules of Civil Procedure impose and to general principles of estoppel.

Argument in support of Question No. 1:

Did the Department of the Interior and the lower courts apply an incorrect test of discovery on an unpatented mining claim.

The decision of the court of appeals is incorrect in allowing the Respondent to confuse the difference between the test of validity for possessory title to a mining claim subject to the paramount title of the United States, and the criteria by which the Respondent gives up its real title through patent. Despite the

premise of Respondent's opposition, Petitioner does not seek review of the long history of consistent administrative and judicial construction of relevant statutes which entitle Petitioner or any other mining claimant to a patent. The Petitioner does not seek a patent in its petition to this court nor is Petitioner challenging tests used by Respondent in determining whether Petitioner was entitled to a patent. Petitioner recognizes that those tests are justly more demanding than the legal requirements for a claimant continuing his possessory rights on an unpatented mining claim.

The sole statutory authority for mining claims is that "all valuable mineral deposits in lands belonging to the United States...shall be free and open to exploration and purchase..." 20 USC Section 22 (1872). Court enunciation of that statute has long established: "(V)alue, in the sense of proved ability to mine the deposit at a profit need not be shown." Adams v. U.S., 318 F.2d 861 (9th Cir. 1963). The so-called "marketability test" devised in the 1950's for application to discovery of common varieties of mineral such as sand and gravel has gradually found its way into general use to test mineral discovery without regard to variety

of mineral or whether the claimant is seeking patent. This development flys in the face of warnings from the courts such as in Book v. Justice Min. Co., 58 F.106 (D. Nev. 1893):

> If this theory were adopted by the courts it would invalidate many mining locations. Moderately carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place, bearing gold or silver, which he had discovered, would pay all the expenses of removing extracting, crushing, and reducing the ore, and leave a profit to the owner...

Attempts by the Respondent to enlarge the application of the marketability test have encountered the proscription of the courts even more recently as in McClarty v. Secretary of Interior (9th C.A. 1969) 408 F.2d 907, 908; and Verrue v. United States, (9th C.A. 1972) 457 F.2d 1202.

Eureka Consolidated Mining Co. v. Richmond, CCC. Nev. 1877, 4 Sawy 302, 8 F.Cas. 819, sets forth that the mining laws "were formed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose." Variously those laws have been interpreted to allow that cessation of the operation of a mine may be caused by innumerable

factors totally beyond the bona fide intentions of the operation, Charlestone Stone Co. v. Andrus, No. 75-1532, U.S. Ct of Appeals, 9th Cir., May 12, 1977; to allow that a favorable showing of bona fides in development is recognized as one of the factors which can serve to demonstrate the marketability of a mineral from a particular deposit, U.S. v. Harenberg, 9 IBLA 77 (1973); and to allow that the long history of actual profitable mining operations are the best evidence of a valuable mineral deposit, U.S. v. McKenzie, 4 IBLA 97 100 (1971).

The mining laws are to be construed "in the light of the general purpose and policy which Congress had in view, namely, the protection of bona fide locators of the mineral lands of the United States, and the development of the mineral resources of the country." Henderson et al v. Fulton, 35 L.D., 652. As Stockley v. United States, 260 U.S. 532 (1923) at 539 points out:

> A change in the practice of the Land Department manifestly could not have the effect of altering the meaning of an act of Congress. What the act meant upon its passage it continued to mean thereafter.

When the Appellee nullifies mining claims for which it will not issue patent, it exceeds its

authority on two counts (1) the patent applicant is never advised in the contest against his claims of what is the modicum of proof differentiating a valid location from a patentable claim and is thereby denied due process; and (2) the present requirements imposed by the Respondent in order to win a patent constitute a marketability test which has never been demanded of a valid location; East Tintic Consolidated Mining Co. (1914) 43 L.D. 79:

> (T)he purpose of the discovery requirement was to prevent frauds on the Land Office; and not to prevent man from protecting himself by locating his claim before he has done the expensive exploration of the depths of his deposit. Lange v. Robinson, (C.A. 9, 1906), 148 F.799.

The courts have held that an "exploration" for mineral may be had following "discovery" Charlton v. Kelly, 156 F. 433; Lange v. Robinson supra. Certainly every development includes an exploration for more mineral, while added information and knowledge gained through exploration is a further development of a mineral property and increase in the value thereof. "(S)o long as the locator or his assignee performs the required amount of work, his right of possession is exclusive. . ."according to Reed v. Munn, 8th Circuit,

148G 737, 557, cert. den. 202 US 588. United States v. Detroit Timber and Lumber Co., 200 US 321, agrees.

Respondent asserts that Petitioner forfeited his claims because his patent application was rejected. Why Petitioner's failure to patent constitutes a forfeiture of his claims is not clear, particularly when his claims were validated by the BLM in a previous hearing not involving a patent application. "Forfeitures have always been deemed in law odious, and courts have universally insisted upon the forfeiture being made clearly apparent before enforcing it." Barringer & Adams, 1897, The Laws of Mines and Mining. 301; Mt. Diablo M & M Co. v. Callison, 5 Sawy. 439 (1897) C.C.D. Nev. Furthermore:"(M)ining statutes are to be liberally construed, especially when it is sought to forfeit claim." Inman v. Olson, 320 P2 1043 (1958).

CONCLUSION

For the reasons stated in this reply and in the petition, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

Hale C Tognoni

Hale C. Tognoni
100 West Clarendon
Suite 1260
Phoenix, Arizona 85013
(602) 263-0771

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I am a member of the Supreme Court of the United States Bar; that I am appearing on behalf of Hiram B. Webb, Petitioner in this matter and that three copies of the foregoing Reply have been served upon all appropriate parties by depositing the documents in a United States post office, first-class postage prepaid, this 3rd day of May, 1984, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Department of the Interior
18th and C. Streets, N.W.
Washington, D.C. 20240

Hale C. Tognoni

Hale C. Tognoni,
Attorney for Petitioner

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

Subscribed and sworn before me this 3rd day of May, 1984.

Marlene L. Brunger
Notary Public